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12 **Donovan Cloud**

13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE EASTERN DISTRICT OF WASHINGTON**  
15 **(Honorable Salvador Mendoza, Jr.)**

16 **UNITED STATES OF AMERICA,**  
17 **Plaintiff,**

18 **vs.**

19 **DONOVAN CLOUD,**  
20 **Defendant.**

21 **NO. 1:19-CR-02032-SMJ-2**

22 **MOTION TO CONTINUE**  
23 **EVIDENTIARY PRETRIAL**  
24 **HEARINGS SCHEDULED FOR**  
25 **SEPTEMBER 29 -30, 2020**

26 **DATE: September 29, 2020**  
**TIME: 9:00 a.m.**

27 **TO: Clerk of U.S. District Court, Eastern District of Washington**  
28 **TO: Thomas J. Hanlon, Assistant United States Attorney**

29 Defense (Donovan Cloud) Motion to Continue  
30 Evidentiary Hearing

1 Currently, an in-person pre-trial evidentiary hearing and status conference are  
 2 set for September 29 & 30, 2020, at 9:00 a.m. in Yakima Courtroom 203. ECF No.  
 3 182. On September 3, 2020, this Court issued an *Order Confirming In-Person*  
 4 *Hearings and Notice RE: COVID-19 Precautions*, which included a directive to the  
 5 parties to “notify the Court how much time they expect the hearing to take, a proposed  
 6 sequence for the hearings, and anything else counsel wishes to make the Court aware  
 7 of concerning these hearings, by September 11, 2020.” ECF No. 187 at 2, ¶3.

8 This motion is in response to the Court’s directive.

# 9 I. MOTION

10 **COMES NOW DONOVAN CLOUD**, by and through his attorneys of record,  
 11 Richard A. Smith and Mark A. Larrañaga moves this Court to continue the  
 12 evidentiary pre-trial hearing scheduled for September 29 – 30, 2020, until the  
 13 ongoing public health crisis comes to an end. In a separate pleading, Defendant  
 14 Donovan Cloud has filed a *Motion to Join Co-Defendant James Cloud’s Motion in*  
 15 *Limine Re: Lindell LaFollette’s False Memory [ECF No. 185]*.

16 The defense does request the scheduled status conference be held as scheduled  
 17 on September 29 or 30, 2020, and for the parties to participate/attend via  
 18 teleconference regarding the status of superseding indictments so the parties and the  
 19

1 Court may be better informed as to the charges and the potential punishments for  
2 purposes of case scheduling.<sup>1</sup>

3  
4 Defense counsel has contacted U.S. Attorney Thomas Hanlon and Richard  
5 Burson and they have no objection to the requested continuance.

6 Defense has been in contact with the attorneys for James Cloud and they have  
7  
8 advised counsel they will be filing a separate response to the Court's Order ECF 187.

## 9 II. BASIS FOR MOTION

10 Initially, a pre-trial hearing as well as a status conference were scheduled for  
11  
12 June 23, 2020. At that time, Yakima County reported the total COVID-19 related  
13 case count was approximately 6,476. KIMA, *Yakima County reports 117 new*  
14 *COVID-related cases on Sunday, July 21, 2020*. As such, the parties submitted a Joint  
15  
16 Emergency Motion to Continue Hearing and Status Conference, which this Court  
17 granted and rescheduled the matters to September 29-30, 2020. *See* ECF 182,  
18 7/1/2020 Text Order.

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21 <sup>1</sup> For example, it is unclear whether the Government is seeking indictments that  
22 may include capital-eligible charges. This, of course, significantly impacts the  
23 complexion of the case, funding and scheduling. *See e.g.*, American Bar Association,  
24 *Toward A More Just And Effective System of Review in State Death Penalty Cases*,  
25 at 43, 49, 50 (Oct. 1989) (“[D]eath penalty litigation is extraordinarily complex, both  
26 for the courts and for the attorneys involved. Not only do the cases incorporate the  
evidentiary and procedural issues that are associated with virtually every noncapital  
case, but they also involve a host of issues that are unique to capital cases.”)

1 The concern surrounding COVID-19 has not subsided over the last three  
2 months. Instead, since the hearings were continued the number of COVID-19 related  
3 cases has nearly doubled. As of September 9, 2020, the number of cases has increased  
4 to 11,867. See Yakima Health District,

5  
6 <https://www.yakimacounty.us/2404/Data-Summary> (last visited 9/10/2020).

7  
8 Moreover, on June 18, 2020, the Yakima County Jail, where Donovan Cloud is  
9 housed, reported 19 inmates tested positive for the virus, which peaked over the  
10 following months to 130 inmates (31% of the inmate population) and 34 correction  
11 officers, and although may have recently declined still remains a concern. Yakima  
12 Herald, *Yakima County jail officials say COVID-19 outbreak under control at*  
13 *facility*, (updated September 9, 2020)

14  
15 [https://www.yakimaherald.com/special\\_projects/coronavirus/yakima-county-jail-](https://www.yakimaherald.com/special_projects/coronavirus/yakima-county-jail-officials-say-covid-19-outbreak-under-control-at-facility/article_2e56bf51-8b19-581a-aae8-7c3659e019b4.html)  
16 [officials-say-covid-19-outbreak-under-control-at-facility/article\\_2e56bf51-8b19-](https://www.yakimaherald.com/special_projects/coronavirus/yakima-county-jail-officials-say-covid-19-outbreak-under-control-at-facility/article_2e56bf51-8b19-581a-aae8-7c3659e019b4.html)  
17 [581a-aae8-7c3659e019b4.html](https://www.yakimaherald.com/special_projects/coronavirus/yakima-county-jail-officials-say-covid-19-outbreak-under-control-at-facility/article_2e56bf51-8b19-581a-aae8-7c3659e019b4.html) (last visited 9/10/2020).

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19  
20 Also on June 23, 2020, the date initially scheduled to hear these matters, the  
21 Eastern District of Washington issued General Order No. 20-101-7 as a measure to  
22 slow the spread of the virus and ensure the safety of litigants, counsel, Court staff,  
23 grand jurors, petit jurors, witnesses, and the public. That COVID-19 response  
24 measure has been extended, most recently on August 21, 2020. *See* General Order  
25 No. 20-102-9. Indeed, this Court, in order to protect the health and safety of  
26 Defense (Donovan Cloud) Motion to Continue  
Evidentiary Hearing

1 defendants, counsel, law enforcement Court staff, and the public, has struck many in-  
2 person appearances. *See* ECF 187. And more recently, this Court, in light of the  
3 ongoing public health crisis caused by COVID-19, struck in-person hearings that  
4 were scheduled for September 22 and 24, 2020 – just a few days before the hearings  
5 scheduled in this matter. *See e.g.*, Case No. 1:19-cr-02058-SMJ, ECF 157 (9/3/2020)  
6 and Case No. 4:19-cr-06069-SMJ, ECF 200 (9/8/2020). For the same reasons,  
7 counsel on behalf of Donovan Cloud move this Court to continue the in-person  
8 evidentiary hearings scheduled for September 29-30, 2020, until the ongoing public  
9 health crisis comes to an end.  
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13       The defense respectfully objects to conducting the evidentiary hearings by way  
14 of teleconference. The Sixth Amendment provides the accused in a criminal  
15 prosecution with “the right ... to be confronted with the witnesses against him.” U.S.  
16 Const., 6th Amend. The Supreme Court has described the Confrontation Clause as a  
17 “bedrock procedural guarantee.” *Crawford v. Washington*, 541 U.S. 36, 42 (2004). It  
18 “provides two types of protections for a criminal defendant: [T]he right physically to  
19 face those who testify against him [or her], and the right to conduct cross-  
20 examination.” *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988). The first type of protection  
21 “guarantees the defendant a face-to-face meeting with witnesses appearing before the  
22 trier of fact.” *Coy v. Iowa*, 487 U.S. at 1016. The literal face-to-face right to confront  
23 witnesses forms the core of the values furthered by the Confrontation Clause. *Cal. v.*  
24 Defense (Donovan Cloud) Motion to Continue  
25 Evidentiary Hearing  
26

1 *Green*, 399 U.S. 149, 157 (1970). Moreover, the Supreme Court has acknowledged  
2 “the strong symbolic purpose” of this requirement. *Maryland v. Craig*, 497 U.S. 836,  
3 847 (1990). This is because “there is something deep in human nature that regards  
4 face-to-face confrontation between accused and accuser as essential to a fair trial in  
5 a criminal prosecution.” *Coy*, at 1017 (quotations omitted). As the Supreme Court  
6 has described:  
7

9 A witness may feel quite differently when he has to repeat his story looking  
10 at the man whom he will harm greatly by distorting or mistaking the facts.  
11 He can now understand what sort of human being that man is. It is always  
12 more difficult to tell a lie about a person “to his face” than “behind his  
13 back.” In the former context, even if the lie is told, it will often be told less  
14 convincingly. The Confrontation Clause does not, of course, compel the  
15 witness to fix his eyes upon the defendant; he may studiously look  
16 elsewhere, but the trier of fact will draw its own conclusions. Thus the right  
17 to face-to-face confrontation serves much the same purpose as a less  
18 explicit component of the Confrontation Clause that we have had more  
19 frequent occasion to discuss – the right to cross-examine the accuser; both  
20 ensur[e] the integrity of the factfinding process.

21 *Coy*, at 1019-20, (1988). See also, *Maryland v. Craig*, 497 U.S. at 846 (“Face-to-face  
22 confrontation enhances the accuracy of factfinding by reducing the risk that a  
23 witness will wrongfully implicate an innocent person”).

24 The Supreme Court has held that a defendant must be present at any critical  
25 stage of the prosecution. *Hopt v. Utah*, 110 U.S. 574, 579, 4 S.Ct. 202, 28 L.Ed. 262  
26 (1884). The defendant's right to be present at a critical stage is rooted to a large extent  
in the confrontation clause. *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482,



1 84 L.Ed.2d 486 (1985). The Supreme Court has not directly addressed whether a  
2 pretrial motion to suppress constitutes a "critical stage" of the proceedings. *See e.g.*,  
3 *Gomez v. Thaler*, 526 Fed. Appx. 355, 359 and n.3 (5<sup>th</sup> Cir.) (unpublished), *see also*,  
4 Christine Holst, *The Confrontation Clause and Pretrial Hearings: A Due Process*  
5 *Solution*, 2010 U.Ill. L. Rev. 1599 (2010) ("the Supreme Court has not directly  
6 addressed whether the Confrontation Clause applies to pretrial hearings[.]").  
7  
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9 Although courts are split, some circuit courts to address the question have  
10 concluded that a suppression motion is, indeed, a "critical stage." *See, e.g., United*  
11 *States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1016-17 (7<sup>th</sup> Cir.  
12 1988) (determining that counsel's failure to file a responsive brief in the State's appeal  
13 from the grant of a pretrial motion to suppress constituted absence of counsel during  
14 a "critical stage"); *Henderson v. Frank*, 155 F.3d 159, 163, 166 (3<sup>d</sup> Cir.  
15 1998) (stating that a suppression hearing is a "critical stage"); *United States v.*  
16 *Hamilton*, 391 F.3d 1066, 1070 (9<sup>th</sup> Cir. 2004) (deciding on direct appeal that a  
17 pretrial motion to suppress evidence constitutes a "critical stage" of the  
18 proceeding); *United States v. Hodge*, 19 F.3d 51, 53, 305 U.S. App. D.C. 204 (D.C.  
19 Cir. 1994) (stating that "a suppression hearing is a 'critical stage of the prosecution'  
20 affecting substantial rights of an accused"); *United States v. Green*, 670 F.2d 1148,  
21 1154 (D.C. 1981) (same).  
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1 The motion to suppress is a "critical stage" because it will determine whether  
2 damning evidence may be admitted into evidence at trial, and because it involves  
3 credibility determinations and the resolution of significant factual disputes. *See e.g.*,  
4 *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021 (1970) (In almost every  
5 setting where important decisions turn on questions of fact, due process requires an  
6 opportunity to confront and cross-examine adverse witnesses.)  
7  
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9 Moreover, permitting any witness to appear by video feed or remote  
10 presentation presents a plethora of problems that can all be avoided by requiring  
11 witnesses to appear in-person. For example, video conferencing does not ensure: that  
12 Mr. Cloud and his counsel will be able to see the witness simultaneously; that Mr.  
13 Cloud and his counsel will be able to observe what the witness is viewing or looking  
14 at while testifying; that if an exhibit is displayed to the witness during direct or cross-  
15 examination that the exhibit will not block the witness's face from view of Mr. Cloud  
16 and his counsel<sup>2</sup>; that if an image or exhibit is displayed to a witness that the testifying  
17 witness will be able to clearly see the exhibit; that the Court, as the finder of fact, will  
18 be able to view at all times witness's testimony simultaneously with any exhibit that  
19 may be displayed to the witness during examination; and, that the video feed will  
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25 <sup>2</sup> *See Coy v. Iowa*, 487 U.S. 1012 (1988), where the Supreme Court held that the  
26 Confrontation Clause was violated where a large screen was placed between the  
testifying witness and the defendant.



1 have uninterrupted connectivity. Face-to-face confrontation ensures the reliability of  
2 the evidence by allowing the trier of fact to observe the demeanor, nervousness,  
3 expressions, and other body language of the witness. In-court testimony also  
4 impresses upon the witness the seriousness of the matter and ensures that statements  
5 are given under oath. Personal appearance also helps assure the identity of the  
6 witness, that the witness is not being coached or influenced during testimony, and  
7 that the witness is not improperly referring to documents.  
8

9  
10 Finally, and perhaps for the reasons stated above, the Eastern District Court's  
11 General Order 20-101-3, which has been recently extended by General Order 20-  
12 101-9, does not list pretrial evidentiary hearings as the types of hearings to be  
13 conducted by teleconference. *See* General Order 20-101-3 at 2, ¶1 (a) – (j).  
14  
15

### 16 III. CONCLUSION

17 For the reasons expressed above, and in response this Court's order (ECF 187,  
18 counsel for Donovan Cloud respectfully move this Court to continue the evidentiary  
19 pre-trial hearing scheduled for September 29 – 30, 2020, until the ongoing public  
20 health crisis comes to an end. The defense does, however, request the status hearing  
21 be held as scheduled and the Court allow the parties to participate/attend *via*  
22 teleconference.  
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Defense (Donovan Cloud) Motion to Continue  
Evidentiary Hearing

1 DATED this 10<sup>th</sup> day of September, 2020.

2 Presented by:

3 /s/ Richard A. Smith

4 RICHARD A. SMITH, WSBA 15127

5 /s/ Mark A. Larrañaga

6 MARK A. LARRAÑAGA, WSBA 2275

7 Attorneys for Defendant Donovan Cloud  
8  
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10  
11 **CERTIFICATE OF SERVICE**

12 I hereby certify under penalty of perjury of the laws of the State of Washington that on  
13 September 10, 2020, I electronically filed the foregoing with the Clerk of the Court  
14 using the CM/ECF System which will send notification of such filing to all parties.  
15  
16

17 /s/ Lugene M. Borba

18 LUGENE M. BORBA

19 Legal Assistant, Smith Law Firm  
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